

## Flood Cases Close to Litigation

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**Only limited areas from 2001 event part of initial 'test trial' in March.**

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After years of legal wrangling and trips to the state Supreme Court of Appeals, a massive consolidation of claims from the July 2001 floods in southern West Virginia are nearing the litigation stage.

An estimated 3,500 plaintiffs represented by such attorneys as Charleston lawyer Stuart Calwell are suing a variety of mining, timbering, railroad and landholding companies, accusing them of altering the land in a such a way that exacerbated flooding in six southern counties. The case is managed by three judges who make up the flood litigation panel -- Raleigh County Circuit Judge John A. Hutchison, lead judge on the flood panel, Nicholas County Circuit Judge Gary Johnson and Ohio County Circuit Judge Arthur M. Recht, chairman of the state's mass litigation panel.

The affected counties were separated into watershed areas -- Tug Fork River, Upper Guyandotte River, Upper (Middle) New River, Lower New River, Upper Kanawha River and the Coal River. The six watersheds can be broken up into 51 subwatersheds, all of which are designated by the state Department of Environmental Protection.

Last June, the panel decided the lawsuits would be broken down into at least three major trials all litigated in Raleigh County.

The first trial will begin in March, with Hutchison hearing pretrial motions March 1-2 and jury selection most likely beginning March 3.

According to Henry Jernigan of Dinsmore & Shohl, this actually will be a "test trial," because only claims from those plaintiffs within two subwatersheds within the Upper Guyandotte watershed are going to trial -- Oceana and Mullens.

Before getting to specific claims, however, the defendant companies first need to know who is suing them, something they have been asking for more than a year. Jernigan said Calwell and the other attorneys are supposed to produce a list of plaintiffs and the defendants each person is suing by Feb. 10.

Messages left for Calwell had not been returned by press time for The State Journal.

One thing Jernigan and the other defense attorneys do know is several companies have been dismissed from the first trial.

"The plaintiffs dismissed a whole lot of mining companies and timbering companies," he said. "They're now going primarily against landholders because they say they had a non-delegable duty to supervise what was going on their property -- the totality of operations on their property that allegedly caused flooding."

According to Calwell's motion that identified which defendants remained and which were dismissed, 15 companies are being sued in the Mullens subwatershed, and 27 defendants were dismissed. In the Oceana subwatershed, 16 companies remain, and 23 defendants were dismissed. Companies that are defendants in both subwatersheds include, but are not limited to Bluefield Timber, Eastern Associated Coal Corp., Georgia Pacific Corp. and Norfolk

Southern Corp.

Hutchison's trial plan is quite limited in scope, Jernigan said, making it essentially a test trial.

"We're going to try these two subwatersheds and see what the verdict is in March," he said. "... This is not a liability trial. It's going to be determined who the plaintiffs are and the burdens owed to them. It is a trial to determine what impact, if any, the defendant companies' activities had on the streams in those two subwatersheds. Liability and damages (for those areas) will be tried in phase II if there is a verdict that warrants a phase II."

According to the trial plan, the phase I jury will decide the following:

- whether each defendant's operations caused a material increase in the rate of surface water runoff that left that area during the July 8, 2001 storm, compared to the amount of runoff that would have happened anyway during the flooding;
- whether the water from the defendant companies' operations caused a material increase in streams overflowing their banks;
- and regardless of the findings in the first two areas, whether the defendants used their property unreasonably.

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